89-933

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JOHN CARPENTER,
COUNTY OF SANTA BARBARA,
Petitioners,
vs.
JAMES D. THOMAS,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a sheriff may take nondisciplinary action against a member of his own department who unsuccessfully challenged him in an election without violating the First Amendment?

PARTIES TO THE PROCEEDING

All parties are listed in the caption.

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PETITION FOR WRIT OF CERTIORARI

The petitioners John Carpenter and the County of Santa Barbara respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on August 9, 1989.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 881 F.2d 828, and is attached hereto as Appendix A.

The memorandum decision of the United States District Court for the Central District of California (Williams, D.J.) has not been reported. It is attached hereto as Appendix B.

JURISDICTION

Respondent brought suit against petitioner under the provisions of 42 U.S.C. § 1983, when he filed his complaint for damages in the United States District Court for the Central District of California on March 16, 1988. Jurisdiction of the district court was invoked pursuant to 28 U.S.C. §§ 1343 and 2201.

On September 12, 1988, the district court issued an order dismissing respondent's complaint with prejudice and granting petitioners' motion to dismiss for failure to state a claim, filed pursuant to Federal Rule of Civil Procedure 12(b)(6). Judgment on that order was entered on September 14, 1988.

Respondent appealed to the United States Court of Appeals for the Ninth Circuit, invoking appellate jurisdiction under 28 U.S.C. § 1291.

On August 9, 1989, the United States Court of Appeals for the Ninth Circuit entered a judgment and an opinion reversing the Central District's order of dismissal. See, App. p. A-1, *infra*. No petition for rehearing was sought by petitioners.

On November 1, 1989, Justice O'Connor ordered that the time for filing this petition for writ of certiorari be extended to and including December 7, 1989.

The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

First Amendment, United States Constitution:

Congress shall make no law . . . abridging the freedom of speech. . .

United States Code, Title 42, Section 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Petitioner John Carpenter has held the elected office of Sheriff of Santa Barbara County since 1970.

Respondent James D. Thomas was hired by the Santa Barbara Sheriff's Department in 1973. Thomas has been a lieutenant in the sheriff's office since 1982. App. p. A-4.

The incidents giving rise to the lawsuit filed in the instant action began in December of 1985, when Thomas challenged Carpenter for the sheriff's position in the

upcoming June, 1986, election. During the course of his campaign, Thomas made statements that concerned the internal management of the sheriff's department, the managerial skills of petitioner Carpenter, and made further remarks challenging Carpenter's commitment to the sheriff's department.

In the June, 1986, election, Carpenter prevailed and was therefore reelected as Sheriff of Santa Barbara County. App. p. A-4.

Since that time, up to and including the time of the filing of this petition, respondent Thomas has not been terminated, transferred, or demoted. In fact, Thomas admitted in his complaint that petitioner Carpenter or the County of Santa Barbara has never initiated disciplinary proceedings against him. App. p. A-4.

In his suit for damages, Thomas alleged that certain nondisciplinary actions taken by petitioners impermissibly violated his First Amendment rights of free speech and political association.

The actions Thomas alleged as unconstitutional are his prohibition from the following:

1. Attendance at departmental meetings, in which Thomas was "sitting in" for an absent superior officer;
2. Participation on the department's policy manual revision committee;
3. Service as a training evaluator of other sheriff's department deputies.

None of these functions falls within the designated duties of a lieutenant in the Santa Barbara County Sheriff's Department.

In dismissing respondent's complaint, the district court noted that Thomas had never lost any portion or

function of his employment to which he had a given right. App. p. B-7.

The Ninth Circuit challenged and disagreed with this contention, holding essentially that regardless of Thomas' entitlement, no action could be taken in derogation of his First Amendment rights. App. pp. A-5, A-6. From that opinion and judgment, this petition is now taken.

REASONS FOR GRANTING THE WRIT

1. THE NINTH CIRCUIT'S DECISION IMPERMISSIBLY EXTENDS LIABILITY BEYOND THE LIMITS OF CURRENT CONSTITUTIONAL JURISPRUDENCE AND CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS

The court below added conflict and confusion to an already unclear area of the law when it reversed the district court's dismissal of respondent's action. The error below is twofold. First, in finding that nondisciplinary action taken by a public employer represents actionable conduct, the Ninth Circuit stepped beyond accepted boundaries decided by this Court and other circuits. This represents error in result.

Second, the court, in reversing the dismissal, failed to recognize the substantial weight given to police agencies in making employment decisions to ensure an effective provision of law enforcement services. By creating a distinction without substance, the court avoided making the proper balancing inquires, inquiries which, as a matter of law, resolve in favor of the nondisciplinary

action taken against respondent. This represents error in procedure.

Combined, this multi-faceted error creates more than just an incorrect decision in the instant case; it sets an unsupported precedent in the area of both first amendment and employer-employee law. This "precedent" conflicts with other circuits and in part, with the decisions of this Court.

Finally, this Court has not spoken to the issues raised by this petition. In order to secure uniformity and guidance in important cases involving these substantial issues, the Court should grant petitioners' request for certiorari.

A. The Decision Below Expands Liability by Allowing a Suit for Damages Based on Non-Disciplinary Action

While it is a well-settled proposition that public employees do not surrender their rights to free speech by accepting employment (*Perry v. Sinderman*, 408 U.S. 593 (1972)), it is equally well-settled that public employers are not helpless to promote the efficient running of government. (*Pickering v. Board of Education*, 391 U.S. 563 (1968)).

In *Thomas*, the Ninth Circuit did acknowledge that respondent was neither terminated, demoted or transferred. App. p. A-5. However, the court felt that it was of "no consequence" that the actions taken by Carpenter did not amount to such treatment. App. p. A-5. Other courts have not so held.

In *Bennis v. Gable*, 823 F.2d 723 (3d Cir. 1987), the Third Circuit held that First Amendment protections are

indeed implicated whenever a government employee is disciplined for his speech. In so holding, the Third Circuit noted that termination was not the only form of actionable conduct. In analyzing the conduct, a reviewing court is to look "not in the harshness of the sanction applied, but in the imposition of any *disciplinary* action for the exercise of permissible free speech." 823 F.2d at 731 (emphasis added).

The key difference between the Third Circuit's decision in *Bennis* and the Ninth Circuit's decision in *Thomas* concerns the type of action taken.

While *Bennis* holds that any *discipline*, albeit in the form of a transfer, demotion, or even outright termination, represents potential actionable conduct, the Ninth Circuit goes much further. Under the ruling in *Thomas*, nondisciplinary action is now actionable. Thomas pleaded and admitted that he was never the victim of any disciplinary action undertaken by Sheriff Carpenter or the County of Santa Barbara. *Bennis* draws the line at disciplinary action, while the *Thomas* court blurs that line with the use of the catch-all term "retaliation." App. p. A-6.

Moreover, the cases cited by the Ninth Circuit in support of this blurred distinction do not approve such an extension of liability; they merely reflect the settled proposition that *disciplinary* action may represent actionable conduct, regardless of the severity of the discipline. *Allen v. Scribner*, 812 F.2d 426 (9th Cir. 1987), *modified*, 828 F.2d 1445 (9th Cir. 1987) represents a disciplinary transfer. *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), involves a termination. *Rankin v. McPherson*, 483 U.S. 378, 107 S.Ct. 2891 (1987), *reh'g denied*, 483 U.S. 1056, 108 S.Ct. 31 (1987), involves a termination of a clerical employee. *Connick v. Meyers*, 461 U.S. 138

(1983) involves the outright dismissal of a deputy district attorney. In short, petitioners have located no cases indicating that nondisciplinary action, even if characterized as "retaliatory," impinges upon First Amendment protections as recognized by this Court and interpreted by other circuits.

Against this lack of authority is a concrete and well-formed policy consideration favoring the administration of government. Over time, this consideration has evolved into a balancing test between the rights of the individual and the necessity for a smooth running government. *Rankin v. McPherson*, 483 U.S. 378, 384, 107 S.Ct. 2891, 2896 (1987). This balancing test was all but overrun by the Ninth Circuit in their haste to consider petitioners' actions as "retaliatory."

Under the Ninth Circuit's new rule, "retaliatory" action, even if nondisciplinary, rises to the level of a constitutional violation. In so holding, the court minimized any policy considerations for the effective running of a police force.

In light of the lack of support and the impermissible extension of liability based on narrower interpretations in other circuits, the balance must now shift in favor of petitioners. Given the prior decisions of this Court and other circuits, ending liability at the disciplinary stage, review of the *Thomas* decision is necessary in order to promote a clear reading of First Amendment law to all courts and all parties.

B. In Failing to Examine the *Elrod* Line of Cases, the Ninth Circuit Creates Conflicting Distinctions Without Substance

In the courts below, petitioners cited to the political affiliation cases of *Elrod v. Burns*, 427 U.S. 347 (1976), and *Branti v. Finkel*, 445 U.S. 507 (1980), contending that if discharge of policymakers is permissible, then *a fortiori* the refusal to allow respondent to affect the policies of the department must also be permissible.

The Ninth Circuit all too briefly dismissed petitioners' citation to the *Elrod-Branti* standard, holding those cases inapposite because the office of Sheriff of Santa Barbara County is nonpartisan. App. p. A-8.

In *Terry v. Cook*, 866 F.2d 373 (11th Cir. 1989), the appellate court upheld a Rule 12(b)(6) dismissal of a civil rights complaint brought by discharged members of a sheriff's department. The *Terry* court found that the *Elrod-Branti* line of cases did apply to the facts of the case, holding that the loyalty required of any deputy is great enough to warrant discharge for failing to support the incumbent sheriff. *Terry*, 866 F.2d at 377.

The court in *Terry* was not bound by any distinction between partisan and nonpartisan politics, holding that "the closeness and cooperation required between sheriffs and their deputies necessitates the sheriff's absolute authority over their appointment and/or retention." *Id.*

The question of requisite loyalty was determined *as a matter of law*, without party affiliation entering the analysis. In further support of this application, and in further conflict with the Ninth Circuit's decision, is the Fifth Circuit's holding in *Tanner v. McCall*, 625 F.2d 1183 (5th Cir. 1980), *cert. denied*, 451 U.S. 907 (1981)

("it was never contemplated that the sheriffs of the state must perform the powers and duties vested in them through deputies or assistants selected by someone else.")

This idea concerning the need for a loyal police force is neither new nor unsettled.

In *Mysinger v. Foley*, 651 F. Supp. 328 (W.D. Ark. 1987), the district court was presented with a case where *discharged* sheriff's deputies brought a civil action claiming the discharge was an unconstitutional retaliation for political activity.

While grudgingly finding a violation, the judge criticized the existing circuit precedent, observing that:

> The court has little doubt but that the plaintiffs were not supportive of the sheriff, and intended to do their part to see that he was not re-elected . . . It does not seem 'fair' to require the sheriff to retain employees who intend to work against him with the desire that either they or someone they support will 'beat him' in the coming election.

Mysinger, 651 F. Supp. at 329.

The *Mysinger* court's frustration is mirrored by the County of Santa Barbara, who must now, through its sheriff, continually expose Thomas to policies for which he has little or no support.

C. The Ninth Circuit's Incorrect Application of Settled Balancing Tests Creates Conflict in Employee Speech Cases

In *Joyner v. Lancaster*, 815 F.2d 20 (4th Cir. 1987), *cert. denied*, 484 U.S. 830, 108 S.Ct. 102 (1987), a captain in the sheriff's department brought an action against the county and sheriff alleging that he was discharged in violation of his First Amendment rights. The captain openly supported a candidate running against the incumbent and current sheriff.

On review, the Fourth Circuit affirmed the lawfulness of the discharge. The *Joyner* court, citing to *Connick v. Meyers*, 461 U.S. 138 (1983), synthesized the balancing test used:

> [T]he court must consider whether or not the speech implicated is a matter of public concern. If a matter of public concern was implicated, the court must consider whether the employee's interest in the speech was outweighed by the employer's interest in the effective and efficient fulfillment of its responsibilities to the public.

Joyner, 815 F.2d at 23.

The court then noted that the outcome of the balancing test is a question of law for the court, not a question of fact for resolution by a fact finder. *Joyner*, 815 F.2d at 23.

Beginning its balancing, the court found that like Thomas, the plaintiff was involved in planning, reviewing and evaluating the work of deputy sheriffs.

Analyzing the interests of the employee, the court found wide ranging considerations based on the professions of the public employees involved:

> Non-policy-making employees can be arrayed on a spectrum, from university professors at one end to policemen at the other. State inhibition of academic freedom is strongly disfavored . . . In polar contrast is the discipline demanded of, and freedom correspondingly denied to policemen.

Joyner, 815 F.2d at 23.

In noting the distinction, the *Joyner* court holds exactly opposite of the *Thomas* court, on ostensibly the same facts.

Like Joyner, Thomas was in a position between line officers and policymakers such as the sheriff. By his allegations, Thomas was clearly involved in policy-making or policy-implementing functions *outside* of his duties as lieutenant in the sheriff's department. He allegedly performed policy manual revisions, and like the plaintiff in *Joyner*, evaluated other deputies. Thomas' claim that he participated in "informational" departmental staff meetings implies that he disseminated that information and thus performed as a link between the sheriff and the deputies whom he supervised. This fact pattern is almost exactly analogous to the situation in *Joyner*, yet a far different result is reached.

Thomas cannot be squared with *Joyner*. From this conflict, no clear guidance for future conduct can be gained, thereby necessitating the intervention of this Court to determine the proper path to take.

CONCLUSION

For all of the foregoing reasons, a writ of certiorari should issue to review the judgment of the Ninth Circuit.

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JAMES D. THOMAS, *Plaintiff-Appellant,* v. JOHN CARPENTER, *Defendant-Appellee.*	No. 88-6507 D.C. No. CV-88-1378-DWW OPINION

Appeal from the United States District Court
for the Central District of California
David W. Williams, District Judge, Presiding

Argued and Submitted
June 7, 1989—Pasadena, California

Filed August 9, 1989

Before: Procter Hug, Jr., Cynthia Holcomb Hall and Charles Wiggins, Circuit Judges.

Opinion by Judge Wiggins

SUMMARY

Constitutional Law

Reversing the district court's judgment of dismissal for failure to state a claim, the court held that a complaint that alleges state action motivated by an intent to retaliate for the exercise of constitutionally protected rights satisfies the requirements of 42 U.S.C. § 1983.

Appellant James Thomas, a Lieutenant for Santa Barbara County's Sheriff's Department, challenged appellee incumbent sheriff John Carpenter in an election for that office. Thomas's campaign literature focused on Carpenter's commitment and competence. Thomas lost, and after the election, Carpenter banned Thomas from attending departmental staff meetings, policy revision meetings, and participating as an evaluator for the department's high risk entry team. Thomas was the only Lieutenant singled out for exclusion, purportedly in retaliation for his campaign against Carpenter.

[1] A cause of action under section 1983 requires plaintiff to plead that defendant acting under color of state law deprived plaintiff of constitutionally protected rights. [2] All that Thomas's complaint needs to avoid dismissal are allegations that Carpenter's conduct was motivated by an intent to retaliate for his exercise of constitutionally protected rights. [3] Whether an employee's conduct is constitutionally protected necessarily involves balancing the interests of the employee as a citizen in commenting on matters of public concern and the interest of the State as employer in promoting the efficiency of the public services it performs through its employees. [4] There is no doubt that Thomas's allegations, taken as true, satisfy the threshold inquiry. The form of speech was literature disseminated widely in the context of a political campaign. [5] Carpenter cannot show, based solely on Thomas's complaint, that Thomas's political loyalty is essential to the effective performance of the tasks removed from Thomas's list of responsibilities. Carpenter may be able to prove this at trial, or even by summary judgment, but at the pleading stage, Carpenter cannot satisfy this burden.

COUNSEL

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Eric S. Oto, Cotkin, Collins & Franscell, Los Angeles, California, for the defendant-appellee.

OPINION

WIGGINS, Circuit Judge:

We must consider in this case the right of a public employee to seek election to the position occupied by his supervisor, free from retaliatory action against him when he fails. Under the circumstances of this case, we hold that the public employee states a cause of action.

I

Appellant James D. Thomas, a Lieutenant for the County of Santa Barbara Sheriff's Department, appeals from the district court's dismissal of his second-amended complaint pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. Thomas's complaint alleges civil rights violations against the County of Santa Barbara and its sheriff, John Carpenter, and seeks both injunctive relief and compensatory and punitive damages under 42 U.S.C. § 1983 (1982). The district court dismissed the complaint with prejudice, concluding that Carpenter's alleged conduct as a matter of law did not violate Thomas's constitutional rights. We have jurisdiction of Thomas's timely appeal under 28 U.S.C. § 1291 (1982).

A dismissal for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6) is a ruling on a question of law and as such is reviewed de novo. *Sanders v. Kennedy*, 794 F.2d 478, 481 (9th Cir. 1986). We cannot uphold such a dismissal "unless it appears to a certainty that the plaintiff would not be entitled to relief under any set of facts that could be proved. All material allegations in the complaint are to be taken as true and

construed in the light most favorable to the non-moving party." *Id.*

The material allegations in Thomas's complaint are as follows. Thomas has been employed by the Santa Barbara Sheriff's Department since 1973. He attained the position of Lieutenant in 1982. A Lieutenant is defined by the department's policy and discipline manual as a "subexecutive" whose duty is to "carry out department policies and administer and supervise the work of various subdivisions." As a Lieutenant, Thomas is not responsible for developing departmental policy, and therefore he, like any other employee, can only recommend policy changes through the designated chain of command. During his tenure as Lieutenant, Thomas had attended over 100 departmental staff meetings in the absence of his Division Commander, attended departmental policy manual revision meetings in conjunction with other Lieutenants in the department, and participated as an evaluator in training exercises for the department's high risk entry team.

In 1986 Thomas challenged Carpenter, the incumbent sheriff, in the June election for that office. Thomas's campaign literature focused on Carpenter's commitment to the sheriff's department and challenged his competence in running an efficient law enforcement agency. Carpenter won the election, receiving 54% of the vote to Thomas's 46%. After the election, Carpenter banned Thomas from attending departmental staff meetings, from attending policy manual revision meetings, and from participating as an evaluator for the department's high risk entry team. Thomas is the only Lieutenant in the department singled out for exclusion, purportedly in retaliation of his campaign against Carpenter for the office of Sheriff. Carpenter asserts that he took these steps because of Thomas's disloyalty and untrustworthiness, but he has not formerly charged Thomas in any departmental disciplinary proceedings. Carpenter's conduct is alleged to have diminished Thomas's professional reputation so that he has lost promotional opportunities within the department and

lateral opportunities with other law enforcement agencies in California. He seeks general damages, punitive damages, and injunctive relief.

II

[1] " 'To make out a cause of action under section 1983, plaintiffs must plead that (1) the defendants acting under color of state law (2) deprived plaintiffs of rights secured by the Constitution or federal statutes.' " *Soranno's Gasco, Inc. v. Morgan*, No. 87-2249, slip op. 5095, 5101-02 (9th Cir. May 15, 1989) (quoting *Gibson v. United States*, 781 F.2d 1334, 1338 (9th Cir. 1986), *cert. denied*, 479 U.S. 1054 (1987)). The district court concluded that Thomas's allegations failed to meet the second of these two elements. The district court reasoned that Thomas was not deprived of any protected right because he "was neither terminated nor demoted nor transferred," and he "had no given right to attend policy-making meetings."

[2] Underlying this rationale is the notion that dismissal was proper because Thomas failed to allege a constitutionally protected property interest. But such allegations are unnecessary under the theory of Thomas's claim. Because "[s]tate action designed to retaliate against and chill political expression strikes at the heart of the First Amendment," *Gibson*, 781 F.2d at 1338, all that Thomas's complaint needs so as to avoid dismissal are allegations that Carpenter's conduct was motivated by an intent to retaliate for his exercise of constitutionally protected rights, *see Soranno's Gasco, Inc.*, slip op. at 5102 n.3 ("The fact that he had no protected property interest in continued employment was not dispositive because his firing, if retaliatory, effectively deprived him of his constitutionally protected right to free speech."). It is therefore of no consequence that, as Thomas alleges, Carpenter chose to remove certain responsibilities from his usual duty assignments instead of terminating, demoting, or transferring him. *See Allen v. Scribner*, 812 F.2d 426, 434 n.16 (9th Cir. 1987)

("If Allen reasonably felt that office work was less desirable than field work, his reassignment might have had an impermissible chilling effect on his constitutionally protected speech," even if the tasks "were commensurate with his training and experience."), *modified*, 828 F.2d 1445 (9th Cir. 1987); *cf. Elrod v. Burns*, 427 U.S. 347, 359 n.13 (1976) (conduct used to discourage the exercise of first amendment freedoms "need not be particularly great in order to find that rights have been violated"; for example, "[r]ights are infringed both where the government fines a person a penny for being a Republican and where it withholds the grant of a penny for the same reason").

The crux of this case, then, rests on whether Thomas's complaint sufficiently alleges that Carpenter acted with an intention of retaliating against the exercise of constitutionally protected rights. Carpenter does not challenge Thomas's allegations that the "substantial" or "motivating" factor of his decisions banning him from certain duties was because of Thomas's candidacy for Sheriff. *See Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 283-86 (1977) (after plaintiff satisfies his burden of showing that the defendant's conduct was motivated by his exercise of a constitutional right, the burden shifts to the defendant to establish that the decision would have been no different even in the absence of the protected conduct). Instead, Carpenter contends that Thomas's campaign against him is not constitutionally protected.

[3] Whether a public employee's conduct is constitutionally protected necessarily involves balancing " 'the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.' " *Rankin v. McPherson*, 107 S. Ct. 2891, 2896 (1987) (quoting *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968)). "The threshold question in applying this balancing test is whether [Thomas's] speech may be

'fairly characterized as constituting speech on a matter of public concern.' " *Id.* at 2896-97 (quoting *Connick v. Myers*, 461 U.S. 138, 146 (1983)). This inquiry is "determined by the content, form, and context of a given statement, as revealed by the whole record." *Id.* at 2897 (quoting *Connick*, 461 U.S. at 147-48).

[4] There is no doubt that the allegations of Thomas's complaint, taken as true, satisfies this threshold inquiry. The content of Thomas's speech was to challenge Carpenter's commitment to the Sheriff's department and his competence in running an efficient law enforcement agency. *Cf. McKinley v. City of Eloy*, 705 F.2d 1110, 1114 (9th Cir. 1983) ("the competency of the police force is surely a matter of great public concern"). The form of the speech was literature disseminated widely throughout the County of Santa Barbara. And, of great significance, the statements occurred in the context of a political campaign. The content, form, and context of these statements clearly satisfy the threshold requirement even under the most exacting of views of what kinds of statements involve matters of public concern. *See Rankin*, 107 S. Ct. at 2902 (Scalia, J., dissenting) (speech on matters of public concern include "those matters dealing in some way with 'the essence of self government,' matters as to which 'free and open debate is vital to informed decisionmaking by the electorate,' and matters as to which ' "debate . . . [must] be uninhibited, robust, and wide-open" ' " (citations omitted)).

Balanced against Thomas's interest in speaking on these matters of public concern is the public employer's interest "in promoting the efficiency of the public services it performs through its employees." *Id.* at 2898 (majority opinion). The focus of this part of the inquiry is on whether the protected conduct disrupts "the effective functioning of the public employer's enterprise." *Id.* at 2899. Factors to consider are "whether the statement impairs discipline by superiors or harmony among coworkers, has a detrimental impact on close working relationships for which personal loyalty and

confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise." *Id.* Where, as here, the challenged speech deals more directly with issues of public concern, the public employer is "required to make an even 'stronger showing' of disruption." *McKinley*, 705 F.2d at 1115.

"Exactly what that 'stronger showing' entails is unclear," *Allen*, 812 F.2d at 432, and even varies depending on the context of the situation. "[A] police department," for example, "ordinarily will not be governed by the same standard as a school district" because of the " 'differences between the public interest in education and the public interest in safety.' " *Id.* (quoting in part *Byrd v. Gain*, 558 F.2d 553, 554 (9th Cir. 1977), *cert. denied*, 434 U.S. 1087 (1978)). Carpenter argues that these safety concerns tip the balance in his favor and therefore Thomas's conduct was not constitutionally protected. "Yet even in a police department, the complained-of disruption must be 'real, [and] not imagined.' " *Id.* (quoting *McKinley*, 705 F.2d at 1115). Here, the clear import of Thomas's allegations is that his campaign against Carpenter did not impede his ability to perform his job or interfere with the safety responsibilities of the department. Simply stated, then, Carpenter cannot use the disruption exception " 'as a pretext for stifling legitimate speech or penalizing [Thomas's expression of] unpopular views.' " *Id.* (quoting *McKinley*, 705 F.2d at 1115).

Carpenter also relies on the political affiliation cases of *Elrod v. Burns*, 427 U.S. 347 (1976), and *Branti v. Finkel*, 445 U.S. 507 (1980), to argue that he could justifiably exclude Thomas from any policy making role on the department solely on account of Thomas's being his political adversary. *See also Soderbeck v. Burnett County*, 752 F.2d 285, 288 (7th Cir.), *cert. denied*, 471 U.S. 1117 (1985). *Elrod* and *Branti* are not directly on point because they address political patronage dismissals based upon party loyalty. The election between Thomas and Carpenter, however, was nonpartisan. Nonethe-

less, "[t]he *Elrod-Branti* line is premised upon concerns similar to those animating the employee speech cases." *Hall v. Ford*, 856 F.2d 255, 262 (D.C. Cir. 1988). Accordingly, "the government interest recognized in the affiliation cases is also relevant in the employee speech cases." *Id.* at 263. The interest advanced by Carpenter's argument is the "need for political loyalty of employees, not to the end that effectiveness and efficiency be insured, but to the end that representative government not be undercut by tactics obstructing the implementation of policies of the new administration, policies presumably sanctioned by the electorate." *Elrod*, 427 U.S. at 367. This interest is not furthered, however, by the discharge of nonpolicymaking individuals who "have only limited responsibility and are therefore not in a position to thwart the goals of the in-party." *Id.*

It simply cannot be decided on the basis of Thomas's complaint that he would be in a position to thwart the goals of the in-party. As noted in *Elrod*,

> No clear line can be drawn between policymaking and nonpolicymaking positions. While nonpolicymaking individuals usually have limited responsibility, that is not to say that one with a number of responsibilities is necessarily in a policymaking position. The nature of the responsibilities is critical. Employee supervisors, for example, may have many responsibilities, but those responsibilities may have only limited and well-defined objectives. An employee with responsibilities that are not well defined or are of broad scope more likely functions in a policymaking position. In determining whether an employee occupies a policymaking position, consideration should also be given to whether the employee acts as an adviser or formulates plans for the implementation of broad goals.

Id. at 367-68. Even this formula is not all encompassing. "[T]he ultimate inquiry," the Court announced later in

Branti, "is not whether the label 'policymaker' or 'confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." 445 U.S. at 518.

[5] Carpenter cannot show, based solely on the allegations of Thomas's complaint, that Thomas's political loyalty is essential to the effective performance of the tasks removed from his list of responsibilities. Thomas alleges that the weekly staff meetings are informational only and do not involve the formulation of departmental policy. Also, it seems patent that the role of evaluator of the department's high risk entry team has no significant relationship to one's political loyalty. The effect of Thomas's participation in policy manual revision meetings is much less clear. Carpenter may be able to prove at trial, or perhaps even by summary judgment, that Thomas's political loyalty in each of these positions is needed for the effective implementation of general departmental policy. *Compare Roth v. Veteran's Admin. of Government of U.S.*, 856 F.2d 1401, 1408 (9th Cir. 1988) (requiring trial on government's defense that employee's speech disrupted the office) *with Balogh v. Charron*, 855 F.2d 356, 357 (9th Cir. 1988) (affirming summary judgment based upon bailiff's status as a confidential employee). At the pleading stage, however, Carpenter cannot satisfy this burden. *Cf. Soderbeck*, 752 F.2d at 288 (whether employee could be fired based on political affiliation "was sufficiently uncertain to be one for the jury to decide").

III

Because Thomas's complaint states a claim under section 1983, we reverse the district court and remand for additional proceedings. Thomas is entitled to costs of this appeal. However, a claim for attorneys' fees is premature and must await the ultimate determination of the prevailing party. *See Hanrahan v. Hampton*, 446 U.S. 754, 756 (1980).

REVERSED AND REMANDED.

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APPENDIX B

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JAMES D. THOMAS,
Plaintiff,
vs.
JOHN CARPENTER and the
COUNTY OF SANTA BARBARA,
Defendants.

Case No. 88-1378 DWW (JRx)
ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

This motion came on to be heard on defendants' motion to dismiss the amended complaint.

Plaintiff, James D. Thomas ("Thomas"), filed an action against John Carpenter ("Carpenter") in his capacity as the elected Sheriff of the County of Santa Barbara and the County of Santa Barbara ("the County"), alleging that both his federal and state constitutional rights were violated in his assignment of and exclusion from the duties of the sheriff's office. Thomas has been a lieutenant in the sheriff's office since November, 1982. He has worked for the County since 1973. In December of 1985, Thomas challenged Carpenter in the June, 1986, sheriff election. The election was held and Carpenter was re-elected as sheriff, receiving 54 percent of the vote. Thomas received approximately 46 percent of the vote.

Subsequent to the election, Thomas alleges that he began to be excluded from normal staff and office meetings. He alleges that he received a memo from Carpenter in one instance informing him that he would

no longer be allowed to attend departmental meetings (or departmental manual revision meetings) which he had attended for years. He was also not allowed to attend staff meetings in his captain's absence as other lieutenants were allowed to do.

On November 5, 1987, Thomas requested the Santa Barbara County Civil Service Commission ("the Commission") to investigate what Thomas believed was retaliation by Carpenter for Thomas running against him for elective office. A written response was issued by Undersheriff Vizzolini which Thomas found convincing for his argument that the behavior was election-related. Meanwhile, the commission decided that its investigation was not the proper action and ordered that a disciplinary or discrimination hearing be granted. Mr. Nye, a hearing officer, was appointed. However, the hearing was dismissed on Carpenter's motion. Thomas claims that these incidents combined to deprive him of his right to free speech, association and assembly, the [illegible]t of liberty and personal security, and rights guarant[illegible]d by the California Constitution. Thomas seeks injunctive and declaratory relief and punitive damages. He prays for relief as follows (and demands a jury trial):

1. Compensatory and general damages in an amount according to proof.
2. Punitive damages against Carpenter in an amount according to proof.
3. Injunctive relief.
4. Declaratory relief.
5. Reasonable attorney's fees incurred.
6. Costs of suit.
7. Such other and further relief as the court deems proper.

On June 7, 1988, defendants moved the court for an order dismissing the Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, alleging that plaintiff had failed to allege causes of action upon which relief could be granted. The court granted the motion with leave for plaintiff to amend the Complaint. On June 22, 1988, plaintiff submitted a Second Amended Complaint. Defendants now move the court for an order dismissing the Second Amended Complaint.

In bringing a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the burden of showing that no claim has been stated is upon the moving party.[1] In assessing the motion, the court presume all factual allegations of the complaint to be true and all reasonable inferences are made in favor of the non-moving party, but legal conclusions, deductions or opinions couched as factual allegations are not given a presumption of truthfulness.

The court must then determine whether "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." In making the determination, the likelihood that plaintiff will prevail is immaterial as is the fact that the requested relief is inappropriate, or the legal theories have been miscategorized.

The elected office of Santa Barbara County Sheriff is non-partisan.[2] State and local laws prohibit retaliation

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1 *Johnsrud v. Carter*, 620 F.2d 29 (9th Cir. 1981).

2 California Constitution, Article II, § 6 provides in pertinent part that:

> (a) All judicial, school, county and city offices shall be non-partisan;
>
> (b) No political party or party's central committee may endorse, support, or oppose a candidate for a non-partisan office.

against an individual for his political affiliations in campaigning for the elected office of sheriff.[3] California statutes prohibits discrimination or retaliation against an individual seeking election for a public office. California Labor Code § 1101 provides that:

> No employer shall make, adopt or enforce any rule, regulation, or policy:
>
> (a) forbidding or preventing employees from engaging or participating in politics or from becoming candidates for public office;
>
> (b) controlling or directing, *or tending to control or direct the political activities or affiliation of employees.* [emphasis added]

California Labor Code § 1102 provides that:

> No employer shall coerce or influence or attempt to coerce or influence his employees through or by means of threat of discharge or loss of employment to adopt or follow or refrain from adopting or following any particular

---

[3] See, the Code of the County of Santa Barbara, California, which provides in pertinent part:

> Sec. 27-29.
>
> . . . any county employee or officer may seek appointment of election to any public position, office or employment for which he is qualified.
>
> Sec. 27-30.
>
> No person in the classified service . . . shall be appointed, promoted, reduced, or removed, or in any way favored or discriminated against because of his . . . political affiliations . . . or other non-merit factors . . . Persons alleging discrimination prohibited by this section may appeal to the civil service commission as provided by the rules.

> course or line of political action or political activity.

California Government Code § 3302(a) states that:

> Except as otherwise provided by law, or whenever on duty or in uniform, *no public safety officer shall be prohibited or engaging, or be coerced or required to engage in, political activity.* [emphasis added]

Defendants do not dispute that Thomas' exclusion from the departmental (and other) meetings is due to his participation in the sheriff elections the previous year. Defendants claim that the action of campaigning gave rise to mistrust and a lack of confidence. They maintain that their actions in excluding him did not violate his federal or state constitutional rights, in accordance with *Elrod v. Burns*, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976).

In *Elrod*, the Supreme Court reviewed actions taken by a newly elected sheriff against existing employees. The petitioners brought suit seeking injunctive relief as well as damages for civil rights violations when they were dismissed. The District Court denied a preliminary injunction because of plaintiffs' failure to show irreparable injury and dismissed the complaint for failure to state a claim upon which relief could be granted. The United States Court of Appeals for the Seventh Circuit reversed and remanded, holding that the complaint stated a legally cognizable claim and instructed the district court to enter appropriate preliminary injunctive relief.

The Supreme Court affirmed, although unable to agree on an opinion. Three Justices are of the opinion that patronage dismissals, which severely restrict freedom of political belief and association, cannot be justified as necessary to (a) insure effectiveness and efficiency of government and public employees, (b) protect

representative government from being undercut by tactics of employees in obstructing the implementation of a new administration's policies that were sanctioned by the electorate, since limiting patronage dismissals to policy-making positions is sufficient to achieve governmental end, or (c) preserve the democratic process through assisting partisan politics. Two of the justices opined that a non-policy-making, non-confidential government employee cannot be discharged from a job that he is satisfactorily performing upon the sole ground of his political beliefs. (Justices Burger, Rehnquist, and Powell dissenting.)

Defendants argue that *Elrod* simply allows the dismissal of individuals who are in a policy-making position (and insist that Thomas is in such a position). They point to a statement made by Justice Brennan:

> Representative government [should] not be undercut by tactics obstructing the implementation of policies of the new administration, policies presumably sanctioned by the electorate.

427 U.S. at 367.

Defendants suggest that by running for a non-partisan position against the current sheriff plaintiff effectively eliminated his ability to objectively implement policy in the sheriff's office and that he cannot now be trusted to be "loyal" to the objectives of the office. The *Elrod* Court did hold that "consideration should also be given to whether the employee acts as an advisor or formulates plans for the implementation of broad policy."

Similarly, Thomas has not lost his job in the instant matter, he has simply been relieved of some of his policy-making responsibilities.

Defendants also cite *Soderbeck v. Burnett County*, 752 F.2d 285 (7th Cir. 1985), citing *Branti v. Finkel*, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980), which acknowledged that there are exceptions to the rule that a public agency that fires an employee because of his political affiliations infringes his freedom of speech. The same exception that defendants find in *Elrod*, the "policy-maker's exception," is noted. However, the *Soderbeck* court held that the policy-making employee may be fired only if the hiring authority can demonstrate the party affiliation is an appropriate requirement for effective performance of the *political office* involved. [emphasis added] [4] Defendants do not argue such facts, but they imply that Thomas' affiliations precluded his effectiveness in the work environment in which he had been functioning.

Plaintiff has cited the recent case of *Johnson v. Koppes*, 850 F.2d 594 (9th Cir. 1988). This case is not of help to plaintiff. It upholds the right of assembly and the right to petition the government. It should be remembered that in the case at hand, Thomas was neither terminated nor demoted nor transferred. He had no given right to attend policy-making meetings. He attended only as an alternative for a superior officer in the event the latter was unavailable to attend. I conclude that Sheriff Carpenter had a justifiable reason to ban Thomas from attending meetings where policy is made and that the reasons are non-violative of any of Thomas' constitutional rights.

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[4] Although the cases cited are dismissal actions, we extrapolate to include retaliatory actions and actions that are "constructive dismissal" as are those in the instant action.

Defendants' motion is granted and the complaint is ordered dismissed with prejudice.

IT IS SO ORDERED.

Dated this 7th day of September, 1988.

DAVID W. WILLIAMS,
District Judge

No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

JOHN CARPENTER, COUNTY OF SANTA BARBARA,
Petitioners,

vs.

JAMES D. THOMAS,
Respondent.

STATE OF CALIFORNIA)
) ss:
COUNTY OF LOS ANGELES)

Donald A. Johnson, being first duly sworn, deposes and says: I am a citizen of the United States and a resident of or employed in the county aforesaid. I am over the age of 18 years and not a party to the said action. My business address is 3550 Wilshire Boulevard, Suite 916, Los Angeles, California 90010. On this date, I served the within PETITION FOR WRIT OF CERTIORARI on the interested parties in said action by placing three true copies thereof with first-class postage fully prepaid, in the United States post office mailbox at Los Angeles, California, in sealed envelopes addressed as follows:

GEORGE W. SHAEFFER, JR.
SILVER, KREISLER, GOLDWASSER
& SHAEFFER
1201 Dove Street, Suite 600
Newport Beach, CA 92660

That affiant makes this service, for ANTHONY P. SERRITELLA, Counsel of Record, COTKIN, COLLINS & FRANSCELL, Attorneys for Petitioners herein, and that to the best of my knowledge all the persons required to be served in said action have been served.

Donald A. Johnson

On December 7, 1989, before me, the undersigned, a Notary Public in and for said County and State, personally appeared Donald A. Johnson, known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

Witness my hand and official seal.

Notary Public in and for
said county and state